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No. 07-722

In the Supreme Court of the United States

AHMAD B. NURRIDDIN, PETITIONER

v.

MICHAEL GRIFFIN, ADMINISTRATOR, NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether or to what extent a plaintiff alleging employment discrimination prohibited by Title VII of the Civil Rights Act of 1964 must exhaust administrative remedies with respect to each discrete, allegedly unlawful employment practice before filing suit in federal court.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-3) is not published in the *Federal Reporter* but is reprinted in 222 Fed. Appx. 5. The opinion of the district court (Pet. App. 4-61) is reported at 382 F. Supp. 2d 79.

JURISDICTION

The judgment of the court of appeals was entered on April 16, 2007. A petition for rehearing was denied on July 2, 2007 (Pet. App. 63-65). On September 26, 2007, the Chief Justice extended the time within which to file a petition for writ of certiorari to and including November 29, 2007, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Title VII of the Civil Rights Act of 1964 (the Act), 42 U.S.C. 2000e *et seq.*, requires "[a]ll personnel actions affecting employees or applicants for employment," in the Federal Government to be "made free from any discrimination based on race, color, religion, sex, or national origin." 42 U.S.C. 2000e-16(a) (Supp. IV 2004). The Act authorizes the Equal Employment Opportunity Commission (EEOC) to enforce those non-discrimination provisions. 42 U.S.C. 2000e-16(b). The Act further authorizes the EEOC to issue regulations governing each federal agency's administrative procedures for investigating and acting upon complaints of discrimination. *Ibid.*

EEOC regulations provide that an aggrieved employee must first attempt to resolve the matter informally by consulting with an equal employment opportunity counselor before filing a complaint against the agency. 29 C.F.R. 1614.105(a). The employee must initiate contact with an agency counselor within 45 days of the allegedly discriminatory act or, in the case of a personnel action, within 45 days of the effective date of the action. 29 C.F.R. 1614.105(a)(1).

At the initial counseling session, counselors must advise employees in writing of their rights and responsibilities, including their right to request a hearing or an immediate final decision after an investigation by the agency, their duty to mitigate damages, and the administrative and court time frames governing administrative and judicial review. 29 C.F.R. 1614.105(b)(1). Counselors must also advise the employee that only claims raised in pre-complaint counseling (or issues or claims like or related to issues or claims raised in pre-complaint counseling) may be alleged in a subsequent

complaint. *Ibid.* If the matter is not resolved in a timely manner through those informal procedures, the counselor must inform the employee in writing of the right to file a formal complaint of discrimination. 29 C.F.R. 1614.105(d).

An administrative complaint of discrimination must be filed within 15 days of the notice issued pursuant to Section 1614.105(d). 29 C.F.R. 1614.106(b). The administrative complaint must contain a signed statement sufficiently precise to identify the aggrieved individual and the agency and to describe generally the actions or practices that form the basis of the complaint. 29 C.F.R. 1614.106(c). The complaint may be amended at any time prior to the conclusion of the investigation to include issues or claims like or related to those raised in the complaint. 29 C.F.R. 1614.106(d). The complaint may also be amended after a request for an administrative hearing, upon a motion filed with the administrative judge to include issues or claims like or related to those raised previously. *Ibid.*

The agency is required to conduct an impartial and appropriate investigation of the complaint and must generally complete its investigation within 180 days of the filing of the complaint, unless the parties agree in writing to extend the time period. 29 C.F.R. 1614.106(e)(2), 1614.108(e). At the conclusion of its investigation, the agency must turn over the investigative file to the complainant and notify the aggrieved person of his right to either an evidentiary hearing before an administrative judge (see 29 C.F.R. 1614.109) or to an immediate, final agency decision. 29 C.F.R. 1614.108(f).

If the employee requests a hearing, the agency must issue a final decision within 40 days of receipt of the hearing file. 29 C.F.R. 1614.110. The final order must

state whether the agency will fully implement the decision of the administrative judge, and it must also notify the complainant of the right to appeal the final agency decision to the EEOC, the right to file a civil action in federal district court, the name of the proper defendant in any such lawsuit and the applicable time limits for appeals and lawsuits. *Ibid.*

An aggrieved person may file a civil action in federal district court within 90 days of receipt of notice of a final agency decision or notice of a final EEOC decision on an appeal from the agency's final decision. 42 U.S.C. 2000e-16(c). If, however, the agency has failed to issue a timely final decision in the first instance, the complainant may bring a civil action 180 days after the filing of the initial charge with the agency. *Ibid.* (incorporating 42 U.S.C. 2000e-5(f)).

The above-described administrative remedies must be timely invoked and exhausted before a civil action may be filed. *National Railroad Passenger Corp.* v. *Morgan*, 536 U.S. 101, 109-110 (2002). As the Court has explained, "by creating a dispute resolution system that requires a complaining party to pursue administrative relief prior to court action," Congress intended to "encourag[e] quicker, less formal, and less expensive resolution of disputes within the Federal Government and outside of court." *West* v. *Gibson*, 527 U.S. 212, 218-219 (1999). An aggrieved employee must accordingly timely exhaust administrative remedies before bringing discrimination claims to court. 42 U.S.C. 2000e-16(c); *Brown* v. *GSA*, 425 U.S. 820, 832-833 (1976).

2. At the times pertinent here, petitioner was an employee of the National Aeronautics and Space Administration (NASA). Pet. App. 5-10. In December 1994, petitioner contacted an equal employment opportunity

counselor at NASA to complain of unlawful discrimination and retaliation. *Id.* at 8. He filed a formal administrative complaint of racial discrimination on February 9, 1995. *Id.* at 67. He alleged that he had been issued an unwarranted reprimand; that he had been initially converted from a contractor to government employee at a lower pay grade than similarly situated contract workers; and that he had been improperly denied promotions over the four years of his employment—all because he is an African-American. *Id.* at 70-71.

On November 5, 1996, petitioner again contacted an equal employment opportunity counselor to complain of discrimination. He filed a second administrative complaint on April 3, 1997. Petitioner alleged that he had been subject to a hostile work environment, citing the denial of a promotion, denial of travel opportunities, various e-mailed and oral admonishments and threats of reprimand, and supervisory interference with petitioner's ability to perform various tasks. The two administrative complaints were consolidated for investigation. On September 21, 1999, NASA issued a final agency decision, finding that NASA had not discriminated or retaliated against petitioner. Pet. App. 10.

3. Petitioner subsequently filed a civil action against the Administrator of NASA alleging that the agency had violated Title VII. The complaint, as amended, alleged that NASA had discriminated against petitioner in denying him a promotion and making certain other personnel decisions, that those actions amounted to retaliation, and that petitioner had been subjected to a hostile work environment. Pet. App. 16-17.

The district court, ruling on the government's motion for summary judgment, entered judgment for the government. The court first found that petitioner had not

exhausted administrative remedies with respect to alleged discrimination in certain decisions concerning initial hiring, work assignments, performance ratings, and promotion determinations. Pet. App. 20-23. The court observed that petitioner conceded that those matters had not been brought to the attention of an agency equal employment opportunity counselor. *Id.* at 22. The court explained that, under *Morgan*, *supra*, an aggrieved employee must exhaust administrative remedies with respect to each discrete act of discrimination before these acts may be challenged in court, and concluded that petitioner's claims were barred "to the extent that these allegations are claims of discrete discrimination or retaliation." Pet. App. 23. The court explained, however, that petitioner's failure to exhaust administrative remedies did not bar petitioner from alleging the same agency actions in support of his hostile work environment claim. *Id.* at 21 n.11.

The court further held that the government was entitled to judgment as a matter of a law on the merits of the remaining claims. It found that some of the claims did not challenge an actionable, adverse employment action (Pet. App. 26, 44), that the government had established a legitimate nondiscriminatory reason for other challenged personnel actions (*id.* at 27-28, 31, 38), that petitioner had not established a prima facie case of retaliation because he had not shown a causal connection between protected activity and adverse employment decisions (*id.* at 53), and that petitioner had not shown the severe, pervasive and abusive conduct necessary to establish a prima facie case for a hostile work environment claim (*id.* at 58).

4. The court of appeals affirmed in an unpublished, per curiam decision. Pet. App. 1-3. The court sum-

marily agreed with the district court's holding that several of petitioner's claims were not fully exhausted, and that the others were not supported by sufficient evidence to survive summary judgment. *Id.* at 2-3.

ARGUMENT

The court of appeals' unpublished decision is correct, in accordance with this Court's decisions requiring Title VII claimants to exhaust administrative remedies as to discrete discriminatory acts before commencing suit, and consistent with other appellate authority addressing the scope of exhaustion requirements after *Morgan*, *supra*. To the extent that petitioner argues that the claims at issue did not involve *discrete* acts of alleged discrimination, that conclusion is fact-bound. Further review is therefore unwarranted.

1. In *Morgan*, this Court concluded that "[e]ach discrete discriminatory act starts a new clock for filing charges alleging that act." *National R.R. Passenger Corp.* v. *Morgan*, 536 U.S. 101, 113 (2002). In so holding, the Court specifically rejected assertions that, under the "continuing violation" doctrine, exhaustion of administrative remedies with respect to one particular act permits a claimant to raise in a court suit, and without further resort to administrative remedies, additional acts that are plausibly or sufficiently related. *Id.* at 114. The Court reasoned that "[d]iscrete acts such as termination, failure to promote, denial of transfer, or refusal to hire are easy to identify" and concluded that "[e]ach incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable 'unlawful employment practice'" as to which timely exhaustion of administrative remedies is required. *Ibid.*

The Court distinguished discrete discriminatory acts from acts that create a hostile work environment. It reasoned that such claims involve repeated conduct that may stretch over a period of time, and that a single act contributing to a hostile work environment may not be independently actionable. *Morgan*, 536 U.S. at 115. The Court accordingly concluded that, while a hostile work environment claim will not be barred if administrative remedies are timely invoked with respect to one of the contributing acts, a "plaintiff raising claims of discrete discriminatory or retaliatory acts must file his charge within the appropriate time." *Id.* at 122.

This Court reiterated those principles in *Ledbetter* v. *Goodyear Tire & Rubber Co., Inc.*, 127 S. Ct. 2162 (2007). It stated that, under *Morgan*, "[a] discrete act of discrimination is an act that in itself constitutes a separate actionable unlawful employment practice and that is temporally distinct." *Id.* at 2175 (internal quotations omitted). And the Court concluded that when an employee challenges a series of personnel actions as to allegedly discriminatory pay, each of which is independently identifiable and actionable, a timely administrative charge must be filed with respect to each alleged violation. *Ibid.*

The decision below, in summarily affirming the district court's judgment, is fully consistent with this Court's decisions. The district court found that petitioner had not invoked administrative remedies with respect to claims that he had been hired on discriminatory terms, denied a promotion, and subjected to discriminatory treatment in work assignments and performance evaluations. Pet. App. 20-23. Applying *Morgan*, the court held that "*to the extent that these allegations are claims of discrete discrimination or retaliation,*

they are barred for a failure to exhaust administrative remedies." *Id.* at 23 (emphasis added). At the same time, the trial court made clear that exhaustion would not be required with respect to every personnel action alleged to contribute to the alleged hostile work environment as long as petitioner had invoked administrative remedies with respect to at least one of the contributing acts. *Id.* at 21 n.11 & 55 n.19.

2. Petitioner asserts that the courts of appeals are divided over whether Title VII claimants must exhaust administrative remedies with respect to allegedly discriminatory acts that follow—and are "related to," Pet. 10—the discriminatory acts raised in a prior administrative charge of discrimination. Pet. 12-23. Petitioner argues that *Morgan*'s exhaustion requirements are limited to pre-charge conduct, and that "[a] majority of the * * * courts of appeals * * * permit plaintiffs to bring suit on any uncharged subsequent conduct that is reasonably related to charged conduct." *Id.* at 12.

To the extent that petitioner suggests that the claims at issue in this case do not involve discrete acts of discrimination (but rather "related" and non-discrete acts), he is mistaken and the conflict he attempts to frame is not implicated by this case. As discussed, the district court held that the claims at issue should be dismissed for lack of exhaustion "to the extent that * * * [they] are claims of *discrete* discrimination or retaliation." Pet. App. 23 (emphasis added).

Nothing in *Morgan* suggests that exhaustion may be excused with respect to discrete unlawful employment practices merely because the alleged discrimination occurs *after* an initial administrative charge is filed. Accordingly, and contrary to petitioner's contentions, no appellate authority purports to dispense with exhaustion

requirements for discrete, independently actionable conduct, regardless or whether the discrete act of discrimination occurs before or after an act identified in a prior charge.

In *Martinez* v. *Potter*, 347 F.3d 1208 (2003), for example, the Tenth Circuit held, consistent with the holding below, that *Morgan* requires exhaustion of administrative remedies with respect to each discrete, independently actionable incident of alleged discrimination. The court of appeals thus concluded that *Morgan* abrogates the "continuing violation" doctrine as applied to claims of discrimination and retaliation and "replaces it with the teaching that each discrete incident of such treatment constitutes its own 'unlawful employment practice' for which administrative remedies must be exhausted." *Id.* at 1210.

Petitioner asserts that, in reaching a similar holding, the court below has adopted a construction of *Morgan* that is in direct conflict with *Wedow* v. *City of Kansas City*, 442 F.3d 661 (8th Cir. 2006), and other appellate authority. Pet. 12-16. *Wedow* and the other cases cited by petitioner, however, have excused exhaustion only with respect to certain narrow categories of subsequent discriminatory conduct that are *closely related* to a prior charge. None of these cases purports to dispense with exhaustion for discrete, independently actionable instances of discrimination—*i.e.*, the kind of claims at issue here. Pet. App. 23.

In *Wedow*, for example, the Eighth Circuit addressed sex discrimination claims raised by female firefighters. The firefighters alleged that their city employer had discriminated against them by failing to provide adequate protective clothing and adequate bathroom and changing facilities, and by engaging in an ongoing retali-

ation against them for seeking redress for this alleged discrimination. 442 F.3d at 666-667. With respect to the discrimination claim, the court of appeals, following *Morgan*, and consistent with the holding below, held that "[d]iscrete acts such as termination, failure to promote, denial of transfer, or refusal to hire are not actionable if time barred, even when they are related to acts alleged in timely filed charges." *Id.* at 670 (internal quotation marks omitted). With respect to the retaliation claim, the court of appeals held that where an initial administrative charge alleged retaliatory acts that were on-going and continuing in nature, exhaustion was not necessary with respect to subsequent retaliatory acts that are of a like kind. *Id.* at 673-674. The Eight Circuit reasoned that where a prior administrative charge alleges continuing and on-going retaliation, subsequent retaliatory actions can be deemed to be reasonably within the scope of the investigation that would be expected to grow out of the initial charges, and resort to administrative remedies for each related, retaliatory act would not be required. *Ibid.*

Petitioner argues that the decision below conflicts with *Wedow*'s holding on subsequent retaliatory actions related to a prior charge of retaliation. The retaliatory actions here, however, are not similarly related to an administrative charge of on-going retaliatory action. Rather, the district court characterized petitioner's claims as a "laundry list of allegedly discriminatory incidents" (Pet. App. 16) which, in the case of petitioner's retaliation claim, merely "reclassifie[d] his allegations of discrimination as claims of retaliation" (*id.* at 17). Similarly, the district court held that petitioner's claims were barred for lack of exhaustion only "to the extent that [petitioner's] allegations are claims of *discrete* discrimi-

nation or retaliation." *Id.* at 23 (emphasis added). The court's fact-bound characterization of petitioner's claims as "[d]iscrete"—rather than closely related—acts of discrimination does not warrant this Court's review. Thus, unlike *Wedow*, this case does not involve retaliatory actions that are closely related to a prior charge of on-going retaliatory conduct.

Nor does the decision below conflict with precedent from other circuits. As an initial matter, the decision below—as well as many of the other appellate decisions cited by petitioner (Pet. 14-15)—are unpublished decisions that do not establish circuit precedent on the scope of *Morgan*'s exhaustion requirements. See *Delisle* v. *Brimfield Twp. Police*, 94 Fed. Appx. 247 (6th Cir. 2004) (unpublished); *Neiderlander* v. *American Video Glass Co.*, 80 Fed. Appx. 256 (3d Cir. 2003) (unpublished); *Eberle* v. *Gonzales*, 240 Fed. Appx. 622 (5th Cir. 2007) (unpublished). Those decisions, as well as the decision below, do not set forth binding circuit law on the question presented by petitioner.

In addition, the decision below is not only non-precedential, but it summarily affirms the district court's conclusion that "after a thorough review of the evidence and the applicable legal standards, * * * several of [petitioner's] claims were not fully exhausted, and that the others were not supported by evidence sufficient to survive summary judgment." Pet. App. 2-3. There is no independent analysis of the question presented that could guide courts in other cases.

Moreover, the other, precedential decisions cited by petitioner, like *Wedow*, only excuse exhaustion with respect to certain narrowly defined conduct that is closely related to a prior charge. *Terry* v. *Ashcroft*, 336 F.3d 128, 151 (2d Cir. 2003) (exhaustion excused for acts

within scope of investigation reasonably expected to grow out of prior charge, acts of retaliation for filing prior charge, and incidents of discrimination carried out in "precisely the same manner" as acts in prior charge); *Lyons* v. *England*, 307 F.3d 1092, 1104 (9th Cir. 2002) (exhaustion not required with respect to subsequent acts that fall within the scope of investigation that can reasonably be expected to grow out of prior charge).* None of these authorities purports to dispense with settled exhaustion requirements for discrete instances of alleged discrimination that bear no close connection to the acts identified in a prior administrative charge—*i.e.*, the kind of alleged unlawful acts at issue here.

3. Petitioner alleges that review by this Court is needed as a practical matter. But especially in the absence of circuit conflict, not to mention a court of appeals' decision squarely addressing any conflict, there is no reason for this Court to grant certiorari here. And even in those circuits that have addressed the question presented, plaintiffs may protect their interest by following the rule embraced by this Court in *Morgan* and exhausting administrative remedies as to discrete allegation of unlawful discrimination.

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* *Rivera* v. *Puerto Rico Aqueduct & Sewers Authority*, 331 F.3d 183 (1st Cir. 2003), also cited by petitioner (Pet. 14-15), is not to the contrary. The court of appeals in that case observed that *Morgan* does not address whether a previously filed administrative complaint must be amended to encompass subsequent discrete acts in order to render such acts susceptible to judicial review. 331 F.3d at 189. But the court of appeals expressly declined to decide whether a judicial complaint of discrimination may encompass non-retaliatory but related discrete acts which took place after the discriminatory act described in the administrative charge. *Ibid.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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